What's a GAL to do? The Proper Role of Guardians *Ad Litem* in Disputed Custody and Visitation Proceedings

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I. Introduction

Often during divorce proceedings courts make decisions regarding child custody and visitation arrangements. These decisions are governed by the "best interests of the child" standard. Generally, courts assume that parents, as the child's natural guardians, will inform the court as to the child's best interests. However, in contested custody and visitation cases (CCVs) the courts often lose confidence that the parents are able to represent the child's best interests. In part, the courts have doubts because where custody is contested, the parents disagree as to the best interests of the child. But also, parents enmeshed in conflict may be unwilling or unable to consider the child's best interests. In these cases, the court will sometimes appoint a guardian *ad litem* (GAL) for the child.[1] In many states, the appointed GAL is also a lawyer.

The court practice of assigning a guardian to advocate a child's interests originates from the ancient doctrine *parens patriae*. This doctrine, established by King Edward in the early 1300's, protected children's property and landholdings against adverse claims,[2] whereas now the doctrine is invoked to assign a GAL to determine which custody arrangements are in a child's best interest. Notably, the early guardian's determination that protecting a child's wealth was in his best interests was self evident. In contrast, the modern GAL's difficulty in deciding whether it is in a child's best interests to award custody to one fit parent over another fit parent cannot be overstated. Originally, *parens patriae* was intended to be exercised by the *state* or *government* generally, not by the judiciary, specifically.[3] Nevertheless, from these inauspicious beginnings grew an extensive body of *judicial* authority.

Initially a GAL's role seems clear. Deeper reflection, however, reveals uncertainty and inconsistency surrounding our assumptions and perceptions about a GAL's duties. Confusion and debate beseige the GAL's role: should a GAL be an advocate for the child's wishes, a champion for the child's best interests, or a neutral factfinder for the court? This uncertainty regarding the role of the GAL fuels a number of related questions. What does the *court* want the GAL to do? How are our expectations altered when the client is a very young child; because of the nature of the proceeding;[4] or because the *child* is not a party to the action?[5] These questions have been answered variously by different states, individual trial courts, and sometimes even by the GALs themselves.

GAL roles generally fall into one of three main categories: advocate for the child's wishes (advocate), champion for the child's best interests (champion), or factfinder for the court (factfinder). Each of the three major roles has a unique function. In addition to serving as an advocate, champion, or factfinder, GAL's have regularly been assigned these additional functions: facilitator, negotiator, mediator, law guardian, litigation monitor, social worker, legal advocate, surrogate parent, and educator. The three GAL roles, in their purest states, are impractical tools for the courts' task of creating a final order governed by the child's best interests. The rigid structure of each model does not permit the flexibility required to respond to the needs of the court, the GAL, or the child. Consequently, courts will request that the guardian play a dual role of say, advocate-champion or advocate-factfinder.[6] However, a representative attempting to play more than one role finds herself in an ethical conundrum. Although the three major roles are rarely assigned singly, they do serve as touchstones for thinking about GAL functions as well as conceptual building blocks for fabricating a useful GAL model. Ambiguity regarding the role of the GAL can result in the GAL performing one role while the court assumes that she is performing another—leading to misunderstandings, ineffectiveness, delays, and harm to the child.

Although most states have GAL statutes, many are skeletal or provide minimum guidance.[7] An example among those offering little help is Idaho's statute:

> When an infant or an insane or incompetent person is a party, he must appear either by his general guardian or by a guardian *ad litem* appointed by the court in which the action is pending in each case, or by a judge thereof, or a probate judge. A guardian *ad litem* may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient, to represent the infant, insane or incompetent person in the action or proceeding, notwithstanding he may have a general guardian and may have appeared by him.[8]

The significance of custody or visitation litigation and the implications of the final order,[9] as well as the state's obligation to protect children, require that GALs be provided with substantial guidance. GAL functions must be clear and specific so that the GAL knows what is expected of her and so that the court knows what services it is receiving from her.

Following a survey of the state's GAL provisions, sections III through V of this article will examine, in their purest states, the three major GAL roles: advocate for the child's wishes, champion for the child's best interests, and neutral factfinder for the court. Section VI will then explore the difficulties encountered in attempts to manipulate and blend these roles. By grouping together the indispensable functions of the three distinct models, we will arrive at a fully functional and effective GAL in the substitute parent model in section VII. The substitute parent model is the most advantageous model for arriving at a final custody or visitation order that is in the child's best interest.[10] After thorough examination of the various GAL functions in detail, sections VIII and IX of this article will explore possible statutory responses to alleviate confusion and provide guidance to the court, the GAL, the parents and the child.

II. Survey of Current Statutory Guidance

The first hurdle to clear in surveying the state's GAL statutes is to find them. The term, GAL, means different things to different people. What we might call a GAL is labeled and defined variously by different courts. The GAL can be referred to as: guardian, law guardian, friend of the court, special master, representative, counsel, attorney, advocate, champion, attorney *ad litem*, public advocate, custody evaluator, or parenting coordinator. Statutes authorizing the appointment of a GAL are most often located in a subset of probate, domestic relations, child protection, juvenile proceedings or within the state or local court rules and procedures. A few GAL statutes may have a heading all their own: guardians, or appointment of guardians generally.

Finding the statutory authority to *appoint* a GAL is far easier than discovering just what this appointed GAL is supposed to do. For definition of the GAL's role researchers may have to resort to the state's code of professional responsibilities, committee reports, and executive or agency guidance. In several cases, there exists little or no description of the GAL's duties and responsibilities.

Once unearthed, my attempt to discover some uniformity among or to impose some structure on the various statutes proved futile. I share this research experience to illustrate that disarray is the pervasive theme when studying any aspect of GALs. What follows is a close look at a few narrowly-defined variables.

A. Statutes that Do Not Specifically Contemplate the Use of GALs in CCV's

One fifth of states do not provide statutes that specifically contemplate the use of a GAL in CCVs.[11] Courts without a specific authorization from the legislature can appoint a special master or expert under Rule 53 who may perform some of what we think of as traditional GAL duties.[12] The role of the special master is generally equivalent to the factfinder GAL and is subject to its attendant debilitating limitations.[13] The special master is an arm of the court and has no guidance specific to CCV cases other than the direction, if any, offered by the appointing court.[14]

All states have statutes contemplating the roles and responsibilities of GALs in situations other than CCVs. But in the ten states that do not have a GAL dedicated to CCV cases, the GAL provisions are inapplicable because the guiding statutes do not anticipate the issues that arise in CCV proceedings. These statutes are drafted within another context, such as: abuse and neglect proceedings, probate, juvenile disciplinary actions, or other cases where the child is a party to the proceedings. They include no individualized provisions designed with the specialized context of custody visitation conflicts. Such statutes make little sense when applied in a CCV setting.

Although neither the state's GAL statutes nor the special master rule address custody cases in particular, the appointing court can instruct the GAL according to each case. In this way, the GAL and the special master duties can be tailored to CCV actions at the discretion of the judge on an ad hoc case-by-case basis.[15] In fact, even some statutes that expressly provide for GALs in CCV's allow for the court to further adapt the GAL's activities and duties depending on the individual circumstances of the case.[16]

B. Statutes that Specifically Contemplate the Use of GALs in CCV's

The remaining majority of the states, forty in all, specifically contemplate the use of GALs in CCVs. However, there is considerable deviation in the nature and extent of the guidance available to these GALs. Of these forty, over half (twenty-five states) offer little direction as to the GAL's responsibilities. In other words, the legislature expressly grants authority to the courts to appoint a GAL in CCV cases but provides little or no guidance as to what the GAL should do in her capacity as such.[17]

Other states have obviously considered and acknowledged the importance of defining the GAL's role and made a good first effort at delineating the duties attendant to the appointment of a GAL. Although incomplete, these states are well on their way to crafting comprehensive guidance to assist GALs in their charge: Colorado, Illinois, Indiana, Kentucky, Minnesota, North Dakota, Texas and Wisconsin. However, where there is room for interpretation, the GAL's role may vary greatly from case to case as courts attempt to interpret unclear GAL statutes.[18] Also, a statute can appear on its face to have a particular purpose, but the courts will interpret it to manifest more of what the court thinks a GAL should be. Besides resulting in less than effective GAL's, this uncertainty contributes to the general aura of melee surrounding CCVs.[19]

States can avoid this confusion by drafting clear, concise statutes that painstakingly outline the GAL's duties and responsibilities. Four states in particular have lead the way in defining, describing and guiding GALs with detailed, comprehensive guidance. California, Maine, Michigan and Missouri each offer extensive resources, guidance and support to the GALs appointed in CCV cases. Regardless of the extent of guidance, the defining documents may be in the statutes themselves or in separate handbooks or may be embedded in the court rules.[20]

C. Courts Defining the GAL's Role

Many statutes specifically authorize the appointing court to augment or limit the GAL's role at its discretion. Other courts find this power inherent under the general authority of the court. Where courts exercise discretion over the GALs duties, there exists a wide variety of GAL roles and uses depending on the state, jurisdiction, court and/or judge. These variations exacerbate the preexisting instability and uncertainty around the GAL's proper function.

Some states specifically state that the GAL's appointment ends with the final order, [21] others instruct the opposite.[22] Although this article is primarily concerned with GALs who protect the child's interests *during* litigation, some states appoint GAL-like types who, among other things, protect the child's best interests only after the final order.[23] Other states permit the GAL to represent the child throughout the litigation and beyond.[24] Extensive study exposes an egregious lack of coherence among the state's approaches to GAL representation. For our own understanding of the different functions of GALs we distill from this quagmire three types of GALs. Although none of the states desires a GAL who fits entirely within one of the three main types, the categories serve as framework from which we can begin to build a more practical GAL model.

III. The Guardian *Ad Litem* as Traditional Advocate for the Client's Wishes

The traditional advocate asserting a client's expressed objectives is by far the most familiar and natural role for lawyers.[25] Lawyers are trained to zealously advocate for their clients within an adversarial system. They are accustomed to and are governed by the American Bar Association Model Rules of Professional Conduct (Model Rules) and the American Bar Association Model Code of Professional Responsibility (Model Code).[26] Through training and practice, lawyers have gained expertise in their advocacy roles as regulated by these rules, as well as proficiency in legal analysis, court procedure, and discovery. The traditional lawyer-client relationship facilitates and nurtures trust by way of the lawyer-client privilege and protects confidential information as guaranteed by Model Rule 1.6.[27] When the court appoints counsel to represent a client's wishes, the lawyer is on familiar ground.

However, the court rarely desires such straightforward, simplistic representation.[28] Usually, the court directs the lawyer to assert the child's best interests over his wishes. Some courts will proffer the nature of custody and visitation proceedings to justify this departure from the usual course of advocacy. [29] Others will construe their GAL statutes to compel the champion result.[30] Still other states have interpreted their statutes variously from case to case to result in the GAL abandoning the pure advocacy approach.[31] From the courts' perspective, because the final award order must be governed by the best interests of the child, presentation of the child's wishes alone would not do much to assist the court in its charge. Consequently, the state, the court or the GAL herself often unilaterally alters the advocate role in order to advance the child's best interests.[32] And it is the court's goal to craft a final order that preserves those best interests. Even where the court or the state intends to appoint a pure advocate, the lawyer may be compelled to assert the child's best interests in accordance with the Model Rules and Model Code.

The Model Rules also anticipate that the client will direct the lawyer or at least manifest consent to the lawyer's direction of his case.[33] These pervasive assumptions are challenged when the client is a child.

A. Capacitated Child

If the child is capable of considered judgment, the relationship between the lawyer and the child-client should be the same as between the lawyer and an adult-client.[34] The lawyer's duty is simply to advance the child's objectives. The Model Rules and the Model Code govern the lawyer's behavior and define the relationship between the lawyer and the client. The lawyer is bound to pursue the child's expressed objectives regardless of whether those objectives are in the child's best interests.[35]

The traditional advocate GAL and her client enjoy an attorney-client privilege which prohibits the GAL from disclosing confidential information revealed to her in the course of representation. This privilege may seem like less of a good idea where the GAL is appointed in a CCV case. For example, imagine that the child tells his lawyer in confidence that he has been physically abused by one parent. Unlike other professionals who are required by law to report such credible allegations, the traditional advocate is required *not* to disclose such information without a client waiver. One can easily imagine less provocative factual scenarios where the advocate's privilege would run contrary to our perceptions of what a GAL should do.

Although quite clear, the straightforward advocate role obviously shortchanges the child's best interests as well as our understanding of the purpose behind appointing GALs in CCVs. In practice, the court often incorporated some championing of the child's best interests into the advocates rule. However, when an advocate is required to assert a child's best interests (see below), she becomes caught in a whirlwind of conflicting directives.

B. Precapacitated Verbal Child Clients

Even when a child can express his wishes, it may not be proper for an advocate to advance those wishes. Applying the Model Rules and Model Code to a precapicitated verbal client

implicates a profound ethical quandary for the advocate. Model Rule 1.14 provides that the lawyer must attempt to maintain a normal lawyer-client relationship regardless of the client's minority: "When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of *minority*, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[36] It strains the imagination to find any aspect of normalcy in a lawyer-client relationship where the client lacks the capacity to make considered decisions. This inability to form considered objectives indicates that the child is precapacitated.[37] And a precapacitated client cannot enjoy the relationship contemplated by Model Rule 1.14 because a definitive aspect of the normal lawyer-client relationship is the client's capacity to make considered decisions. A client who cannot form considered decisions necessarily cannot act in his own self interest.

Paradoxically, the Model Rules advise that, if the lawyer ascertains that the client cannot act in his own self interest, the lawyer may seek appointment of a guardian under Rule 1.14(b): "A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."[38]

In addition to the circular nature of the Model Rule guidance, the combination of these provisions confers unacceptably wide discretion to the lawyer in four ways. First, the language allows the *lawyer* to determine when a "client's ability to make adequately considered decisions . . . is impaired." In other words, the lawyer makes the call as to whether the child has capacity. Judging a child's capacity can be extremely difficult in any case and is nearly impossible where the evaluator is a stranger to the child. The task becomes harder still when the child has some cognitive or emotional disability or aberration.

Second, part b directs the *lawyer* to establish whether a "client cannot adequately act in the client's own interest." Neither the determination of whether a child can make considered decisions, nor whether a child can act in his own best interests, is within the purview of legal analysis for which the lawyer is trained.

Third, provision 1.14(b) allows, *but does not command*, that the lawyer take protective action or seek appointment of a guardian when a client cannot act in his own best interest. The discouraging syntax of the language—the lawyer *"may"* do this *"only"* when that—implies that the option of protective action is an uncommon last resort and that it should be avoided. Under circumstances where a minor client cannot act in his own interests it is appropriate to mandate, rather than merely to allow, a guardian to be appointed.

Fourth, Comment 2 of Model Rule 1.14 implies further that the lawyer herself should act as the protector: "If the person has no guardian or legal representative, the lawyer often must act as de facto guardian."[39] Because a guardian for a precapacitated client has a duty to determine his best interests, this provision implies that the advocate herself should make that determination. "A dichotomy exists between the attorney as guardian and the attorney as advocate, and the lines become very easily blurred. An attorney who has been appointed by the court has to be ever mindful of the Rules of Professional Conduct."[40] Besides suggesting that a lawyer make a specialized determination in an unfamiliar field, Comment 2 places the lawyer in an ethically precarious position. As a de facto guardian, the lawyer must make decisions for her client[41] that require an expertise untraditional to lawyers.[42] It is unclear whether the lawyer—acting as de facto guardian—should not only determine the best interests, but then also should promote them to the exclusion of the client's wishes.[43]

The lawyer promoting a position on behalf of her client that is adverse to her client's expressed wishes, is a lawyer embroiled in a severe ethical dilemma. Such advocacy directly opposes Model Rule 1.2(a) providing that: "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."[44] Similarly, Ethical Consideration 7-7 of the Model Code provides: "[T]he authority to make decisions is exclusively that of the client and . . . such decisions are binding on his lawyer."[45]

Summarizing and distilling the irreconcilable direction from the Model Rules and the Model Code, the implicit and consistent presumptions of both embody substantial overreaching by the lawyer—not only does the appointed lawyer determine the child's best interests but she also makes the threshold determination of whether or not the child has capacity.[46]

This is a disturbing development. The ability to practice law and the ability to discern the best interests of a precapacitated child-client require vastly different schooling and expertise. The *first* Model Rule "reminds attorneys not to take on tasks which they are not competent to perform."[47] Nothing in a lawyer's training gives her the ability to determine the best interests of a precapacitated child. I cannot overemphasize the dissimilarity of abilities between an early childhood development professional and a practicing lawyer. Without appropriate training, the lawyer must resort to using her personal experience to make the judgment.[48] The irrational assumption that a legal professional is capable of discerning a client's best interests—apart from his legal interests—is a common strand of misconception weaving through all of the GAL models currently available. This presumption is categorically unsupportable.[49]

C. Preverbal, Precapacitated Clients: Newborns to Toddlers

Preverbal children simply cannot express their wishes in order to have them advanced. The law presumes that a preverbal, precapacitated client's wishes are represented by his best interests. Therefore, the traditional advocate representing a preverbal, precapacitated client *must* act as a champion and further, not the child's wishes, which are unknown and unknowable, but the child's best interests.

Who will ascertain this child's best interests? You guessed it, as it is for the verbal, precapacitated client, it is for the preverbal, precapacited client, the lawyer decides. Although a dramatic departure from the usual role of the lawyer, this determination has often been delegated to or voluntarily assumed by the appointed lawyer. Comment 2 following Model Rule 1.14 implies that the lawyer is entitled to act as a child's guardian.[50] This guardian role necessarily entails determining her client's best interests.[51]

However objectionable assertion of a child's wishes over his best interests may appear, certain functions of the traditional advocate are advantageous. In particular, it is desirable to retain traditional attorney-client confidentiality privilege because it fosters trust; legal proficiency because it engenders zealous advocacy; and due respect for the child's voice. The basic assumption and strength of the adversarial system is that a lawyer performing her role as an advocate ensures that a client's voice will be heard.[52] Appointment of an advocate placates society's appetite for hearing the child's perceptions of current and potential custody and visitation arrangements. However, the GAL, advancing her client's wishes may do so at the expense of his best interests. The pure advocate role ensures that the child's voice will be heard and places it in the forefront. In fact, the compelling drive to give voice to the child's wishes fuels many GAL appointments. However, the argument to highlight the child's voice is less persuasive in the visitation and custody context as compared to an adversarial proceeding where the child is an adverse party in the action.

By forcing the child to accept only the limited services that an advocate can ethically provide, we have put the cart before the horse. We are defining what the child can have by what the lawyer can give. Rather, the inquiry might more properly begin by asking what the child needs and tailoring the GAL's role to meet those needs.

With its rigid rules and its disregard for the child's best interests, the traditional advocate does not fulfill our expectations of a GAL. A GAL is generally understood to represent the best interests of the child.[53] The next section will focus on the strengths and weaknesses of best interests champion in detail.

IV. The Guardian *Ad Litem* as a Champion for the Child's Best Interests

Using a GAL to champion the child's best interests makes sense against the backdrop of the court's ultimate goal to create a custody and visitation order according to that standard. But

the "best interests of a child" is a vague concept subject to a broad range of interpretation.[54]

The court, GAL, client, and parents all need to understand not only the role a GAL will play, but the factors that will be used to make the best interest determination. In jurisdictions appointing lawyers as GALs, understanding how "best interests" is defined and determined unearths new sources of ethical uncertainty for the lawyer and pays credence to the suggestion that GALs (whether lawyers or not) need extensive training.[55] "[T]he 'child's best interests' is a vague and ambiguous standard which is defined differently by scholars, courts and guardians *ad litem*."[56] The process of determining a child's best interest is often subjective and arbitrary. Washington's GAL statute offers this broad definition: "[The] best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care"[57]

Some states define the concept by reference to criteria to be considered in the best interests determination, including: the parent's wishes, the relationship between the parents and the child, the child's adjustment to home, school and community, the character and circumstances of all involved, the need for continuity and stability for the child, the existence of domestic violence, and the child's wishes.[58] Although not dispositive, often the champion GAL uses the child's wishes as a factor in determining his best interests.[59]

Washington's statute indicates the potential for vast scope and intricate detail in its overarching inquiry for determining a child's best interest:

> [T]he investigator may consult any person who may have information about the child and the potential parenting or custodian arrangements. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent or the child's custodian; but the child's consent must be obtained if the child has reached the age of twelve, unless the court finds that the child lacks mental capacity to consent.[60]

The pure champion model raises uncertainty surrounding the relationship between the parents and the GAL. What are the permissible boundaries of the investigations? When the GAL is interviewing a parent, must the parent's lawyer be present? Should the other parent have access to the interview? If not, can the GAL keep confidences of one parent from the other? Can she keep such confidences from the other parent's lawyer? Does this investigative role interfere unreasonably with the parent's privacy rights? These are some of the many complex issues facing jurisdictions employing GALs as champions.[61]

The role of the champion in court is as an active participant calling witnesses and cross-examining the parent's witnesses. The GAL's involvement in court proceedings heightens the adversarial atmosphere between the parents and the champion and consequently may harm the child. If the champion is not also a lawyer, the child will suffer a severe disadvantage in court. Legal expertise is essential to effective representation for the child. It does not matter how proficient the champion is at determining the child's best interests. If she is ineffective or incompetent in the courtroom, the child's interests will be impaired.

Many courts require the GAL to act as a witness in the CCV case. This highly questionable duty compromises the child's interests.[62] Whether or not the champion is a lawyer, the combined roles of witness and advocate erode the trust between the child and the GAL because the child's confidences are subject to disclosure on the witness stand. Even mildly vigorous questioning of the GAL can severely impair effective representation for the child when that GAL is simultaneously acting as a witness and an active participant in the same proceeding.

Opponents to the champion model also complain that the GAL enjoys an inordinate influence over the court.[63] Because the final ruling must be in the child's best interests and the champion offers just such a determination to the court, the court's obligation becomes moot. It

can simply accept the GAL's findings and make a final order accordingly.

To this objection I would reply, "so what." The concern that the champion improperly usurps the court's role is unconvincing. As long as the best interest of determination is reliable—and this reliability is apparent to the court—the court is well within its authority to rule on that evidence. The assessment of the child's best interests is more appropriately assumed by professionals in the fields of sociology, psychiatry, counseling and child development.[64] I propose that the court should grant substantial deference to the testimony and evidence brought by such professionals and limit itself to its gatekeeper function ensuring testimonial quality. The prudent court avoids making the highly technical and specialized determination of best interests. Given the dubious underpinnings of the court's role,[65] it is wise to defer to an expert on the best interest determination and is well within its authority.

One trait lacking from the champion role is protection for the child *outside* of the courtroom. Although the champion must assert the child's best interests in court there is no such protection throughout the determination process.[66] This separate security is often incorporated into the champion role, but is distinct and deserves special attention and exploration. It will be addressed further in the substitute parent section.[67]

Nevertheless, appointing a champion produces many desirable results. The court acquires the information it needs to make an effective order, the child's "voice" is heard, and—if the champion is an active and effective participant in the proceedings—the child's best interests are zealously advocated.

Sometimes the court views its proper role as making the best interests determination itself, solely. In that case, it will appoint a GAL to obtain and provide to the court all of the information relevant to that evaluation. The GAL, who will appear as a witness, and from whom the court requests only facts—no legal conclusions—is called a factfinder.

V. The Guardian *Ad Litem* as a Factfinder for the Court

Because the court doubts the parents' ability to offer evidence of factors affecting their child's best interest, it may appoint its own investigator.[68] Of the three dominant forms of GALs this one is the least defensible. Although the factfinder function is important, it falls short of our expectations of a GAL as a child's protector because the factfinder owes no allegiance to the child. The factfinder is an arm of the court.[69] The job of the factfinder is to supply the court with the information it needs to determine the child's best interests.[70] The factfinder should not offer her own speculation or judgment. Unlike the advocate or champion, she must remain neutral and offer only facts, not legal conclusions, like the determination of the child's best interest.[71] One court found that a GAL's proper role was to remain a "neutral assistant of the court."[72] The GAL's duty is simply to supply facts to "assist the court in achieving a proper disposition."[73]

As an agent of the court, the factfinder can testify as a witness—expert or otherwise—subject to cross-examination. She can interview and observe the parties. Since the GAL is not representing a client, she does not face any conflicts of interest in complying with the Model Rules and Model Code. The factfinder does not speculate as to the child's interests, nor does she make decisions for her client. The court is her client.

Endorsing this form of court-ordered discovery is troubling. Independent investigations by the court have long been considered anomolous to American jurisprudence. Our judges are to be arbiters of cases and controversies, and are to base their decisions on the arguments brought through the zealous advocacy of the parties. Although an inquisitorial style of proceedings finds favor in some countries, our nation has explicitly rejected it. Unlike our European counterparts, we caution our courts against acting as investigators to uncover facts not brought before the court.[74]

Additionally, the presumption that the court is receiving pure unbiased fact belies common sense. The factfinder's broad discretion to shape her investigation necessarily reflects personal

biases and perpetuates her vision of what factors are relevant to a best interest evaluation.[75] The perpetuation of the factfinders individual choices and valuations is inapposite to the role of a factfinder as neutral. Treating the biased information offered by the GAL as "dispassionate fact" further skews the court's determination. That the bias is unidentified and unrecognized compounds its harmful potential.

Like the champion's evaluation, the factfinder's investigation also "undermines legitimate parental privacy interests" and autonomy.[76] Ordering outside investigation into family affairs, lifestyle, parents' personal habits and behaviors represents an unwarranted invasion of privacy.[77]

In family law, often the subject matter before the court is plainly unsuited for traditional adjudication. The issues can be extremely personal in nature and the parties emotionally entangled. Applying the law to resolve such issues is analogous to applying reason to resolve a toddler's tantrum. Consequently, family courts have whole-heartedly employed alternative methods of resolution. Mediation, arbitration, counseling, and settlement play an ever-expanding role in family court. The legal community recognizes that certain decisions are best made outside of the courtroom. I adhere to that premise. I further believe that the "best interests of a child" determination is one of those such decisions.

The responsibility to determine a child's best interest belongs with his parents. When they are unable to do so, that responsibility must be delegated to another party. However, it does not follow that this parental responsibility should be delegated to our courts. In an attempt to create a substitute parent figure through our courts, we compromise our judges' legitimacy as neutral arbiters.[78] Although a noble endeavor, judges assuming the parental role overstep their authority and expertise. What disqualifies a lawyer from being an effective parent substitute is equally true of a judge.[79] Of the many professions, law is a poor choice of a pool from which to choose a parent substitute.[80] Given our expectations of the judge as an arbiter for the *parents* in a custody action, it is implausible that the judge could reasonably serve, at the same time, as a parent figure for those parents' child.

Neutral factfinding has disadvantages that make it a less-than-useful implement for arriving at an intelligent order. "The expectation that guardians *ad litem* should function as these independent fact finders for courts, however, does not necessarily promote the best interests of society . . . [I]t causes guardians *ad litem* to focus on the needs of the court, not the needs of the children."[81] The fatal flaw in the use of a neutral factfinder is that the child remains underrepresented.[82] Under the factfinder model, there is no guarantee that the child's voice will be heard. As an agent of the court the factfinder may indirectly protect the child by assisting the judge in determining an order in his best interests. However, it is generally accepted that a factfinder is not representing the child-client, but performs her duties at the court's discretion. Because the factfinder's allegiance is to the court, the child is left unprotected and vulnerable. Appointment of a factfinder exposes the still-unrepresented child to further investigation and interrogation at the hands of this factfinder. This unhappy result is hardly within the spirit that motivates GAL appointments.

Our judicial system may be too deeply entrenched to remove the charge to the courts to determine the child's best interests, but it would not threaten revolution to limit the court's role by requesting an outside expert opinion as to that determination. The court will retain its authority to weigh the testimony and evidence of the witnesses. While the factfinder provides essential information for the court's final determination, its inflexibility and limited scope make it an untenable tool for protecting a child's interests. It also intolerably discounts the child's voice.

The major problem areas of the three main GAL roles include: inadequate representation of the child's best interests, incompatible GAL functions—in particular, clashing rules for lawyer GALs—misunderstandings between the court and the GALs as to the GAL's role, threats to the GAL-child privilege and subsequent impairment of candid disclosure, uncertainty surrounding the parent-GAL relationship, and inadequate training and unhelpful statutory guidance.[83]

VI. The Problems Resulting from Merging the Three Roles

Examining each of the three categories of GAL models makes it abundantly clear that not one alone satisfactorily fulfills our expectations of an effective GAL. The advocate will assert the child's wishes over his best interests. The champion cannot offer confidentiality, zealous advocacy, or adequate legal representation. The factfinder represents only the court's interests and acts neither as the child's advocate nor his champion leaving him vulnerable to the detrimental effects of the litigation. To address each model's attendant shortcomings, the states and/or the courts have attempted to blend the roles. The resulting mélange confuses and conflates the various roles and requires the GALs to jointly perform incompatible functions.

A. Merging the Factfinder with the Advocate

The courts and legislatures have attempted to address the shortcomings of the factfinder by incorporating certain duties and responsibilities of the traditional advocate into the factfinder's role. Because the factfinder's primary responsibility is owed to the court, it simply belies common (and professional) sense to charge her simultaneously with representing the child's wishes before the same court. Combining the roles breeds wholesale confusion[84] and creates insurmountable conflicts. The factfinder's split loyalties between the court and the child pave the way for a host of ethical conflicts when the courts' interests and the child's wishes are not aligned.

The factfinder-advocate would face a debilitating dilemma when called as a witness. If we allow the advocate-like factfinder to respect the child's confidences, as we must under the attorney-client privilege, she is justified in withholding those confidences from the court. This combination of duties and privileges creates a wholly ineffectual factfinder and unnecessarily hobbles the advocate. The court has little use for a factfinder who does not reveal facts.

B. Merging the Factfinder with the Champion

Some courts allow a factfinder to include, as a fact, its own determination of the best interests of the child and to recommend alternatives that the GAL believes are in the child's best interests. However, attending an attempt to incorporate any measure of client representation into factfinding, both the factfinder's neutrality and the champion's aptitude are compromised.

> For example, the expectation that a guardian *ad litem* will bring 'all of the requisite information bearing on the question' to the attention of the court creates a conflict with the guardian *ad litem*'s duty to represent the best interests of the guardian's ward in those cases in which the guardian *ad litem* believes the best interests of a child are best served by bringing only some of the relevant information to the attention of the court.[85]

Additionally, in the event that we allow the factfinder discretion to determine a child's best interests, we can fairly question the competence of the factfinder, without expertise or training, to make that determination.[86]

Bringing advocate or champion functions to bear on the factfinder's role comes burdened by a host of impossible conflicts and insurmountable problems.

C. Merging the Champion with the Advocate

As we saw in Section III, where a GAL attempts to advocate for a very young child, adherence to Model Rule 1.14 necessitates a merger of the advocate and champion role. Aside from the ethical dilemma inherent in blending the roles, the resulting amalgam is a source of great confusion.[87] Reading the Model Rules and Model Code together leaves the lawyer wandering through a morass of irreconcilable directives: assert the clients wishes, always include the client in decisions, determine whether the client can make considered decision-making, assign or act as a guardian for those who cannot

make considered decisions, never act outside of your professional expertise, and finally, represent incapacitated clients as nearly as possible like a regular client.[88]

In addition to the professional conflicts inherent to the dual advocate-guardian role, difficulties arise from the shifting relationship between the lawyer and the child's parents. With the move away from the traditional advocate role, the relationship between the parents and the lawyer becomes unclear. The softening of the advocate model creates uncertainty surrounding the relationship and alters the parent's perception of the lawyer as an adversary. The parents and the lawyer question whether treating one another as "adverse parties" makes sense in the more child-centered, best-interest context. Hazy lines make it difficult to know whether the lawyer's discussions with a parent must be in the presence of the parents' counsel or whether the lawyer can keep the secrets of one parent from another.

Potential alliances between the lawyer and the parents can undermine the child's effective representation. The shift toward a best interest champion moves the parents and the GAL toward "the same side." This common ground can create problems where the parent's interests are diverse from the child's best interests.

A pure advocate's role in the courtroom is clear. She may bring witnesses, cross-examine the parents' witnesses, and present evidence. By incorporating champion elements, the GAL's role may include *acting* as a witness. The ethical barriers to subjecting the child's lawyer to examination and ordered disclosure remain intractable. The advocate-client privilege is impermissibly compromised, and the child's interest is dramatically prejudiced by allowing or commanding his advocate to take the stand.

Although a fundamental aspect of the traditional advocate role, the lawyer-client privilege is not basic to the champion role. As the advocate takes on the champion's functions she often must sacrifice her lawyer-client privilege because disclosing confidential communication may be in the child's best interests.[89] Some jurisdictions require only that the advocate disclose to the court any disagreement between the child-client's wishes and the advocate's determination of the child's best interests.[90] However, any shift away from maintaining the privilege necessarily implicates ethical uncertainty for the advocate. Additionally, the knowledge that his confidences may be disclosed will chill the child's discourse, stifle productive communication and undermine the trust and candor fundamental to the GAL-child relationship. The resulting reticence would thwart the child's best interests.[91]

A separate motivating argument against relaxing the advocate's rigid stance stems from fear that the child's voice will be lost. As the champion functions encroach on the traditional advocate's turf, the weight of the child's wishes diminishes and may be discounted by the court. One response to this concern is that the champion *does* usually attend to the child's wishes. Although not conclusive, the child's wishes are often a considered factor for determining the child's best interests.[92]

The recurring theme of attorney competence raises its thorny head again. One can fairly ask where an attorney obtains the expertise to make a determination of a child's best interest.

> Guardian *ad litem* practice is unique and complex and, as such requires special education, training and experience. The guardian *ad litem* needs an understanding of family dynamics and child development in order to evaluate observed and reported behaviors. The guardian *ad litem* must interpret lengthy case information, which may include references to stress and abuse syndromes, physical determinations of abuse, causal factors in abuse and neglect, and the concepts of treatment designed to address abusive behaviors. The guardian *ad litem* must be able to understand these references and see how determinations of probable cause are developed, how and why treatment programs are prescribed, and how to incorporate these references into his or her recommendations for the best interest of the child.
>
> The guardian *ad litem* is not expected to make diagnostic or therapeutic recommendations but is expected to provide an information base from which to draw resources.

> Therefore, the guardian *ad litem* must have a working knowledge of family dynamics and be able to compare and relate this concept to the observations, reports and documentation received regarding the child and the child's family.[93]

An attorney with no additional training possesses no inherent ability to discern a child's interests, outside of his legal interests.[94] The lawyer, charged with discerning a child's best interests, implicates profound ethical questions.

As we have seen, several problems emerge from blending the dueling roles.[95] Some critics argue that because of the ethical conflicts inherent in incorporating champion functions into the advocate's role, it is ethically improper for an advocate to advance anything but her client's wishes.[96]

When the court expects that the GAL will encounter conflicting roles, it must direct the GAL toward an appropriate resolution. Some states prioritize and command which role will dominate.[97] Other states allow the lawyer to choose only one role. Still others mandate relinquishing all duties in the face of conflict.[98] Many states do not adequately address the challenges facing the GALs as they attempt to juggle their various duties.

Manipulations of the advocate role to create a dual champion-advocate model create such insurmountable difficulties that we might favor abandoning the attempt.[99] When altering the lawyer's role so that 1) she is no longer required to zealously advocate her client's wishes, 2) she determines her child-client's best interests, and 3) her client's communications are no longer protected, I question whether the alterations are not so drastic as to make a lawyer ineligible for the position.

Unsatisfactory attempts to repair the existing roles simply introduce a fresh parade of unacceptable horribles. Rather than strain the perimeters of any of the three major roles and leave them misshapen and unfit even for the contexts in which they are useful, it is preferable to fashion a GAL especially suited for CCVs. Under the name of parent substitute, we will gather the GAL duties that are most useful to the court, the child and the parents, and we will fashion a functional and effective GAL using the essential elements of the three GAL roles.

VII. The Guardian *Ad Litem* as a Parent Substitute

An ideal GAL would protect and support the child throughout the legal proceedings, honor the child's confidences, and discern and promote the child's best interests. Conveniently, these functions form a striking parallel to what we expect from a normal parent on an average day. Not surprisingly, successful replacement of the parents—who are temporarily disabled and cannot perform their usual functions—requires another parent: a substitute parent. In truth, the GAL "actually acts on behalf of the *parents* in pursuit of the best interests of their child in litigation, *not on behalf of the child*."[100]

Thinking of the GAL as a "parent substitute" lends clarity to our conceptualizations of an effective GAL.[101] Like a normal parent, in anticipation of a child's major life change, a substitute parent would investigate, research and evaluate the new options as well as inspect the child's current situation. A parent—or substitute parent—would structure and coordinate the investigations to ameliorate any accompanying stress, and would otherwise protect the child from the harmful consequences of the proceedings. The best interests of the child would be preserved not only in the final arrangements, but throughout the potentially harmful process.

This remnant of the factfinder function (investigation and research) is compatible with the substitute parent because the GAL's client is the child, not the court. The GAL is not collecting information as an arm of the court. Instead, the substitute parent investigates the child's circumstances with an eye toward discerning the child's most advantageous future circumstances. She also protects the child *during* the investigative process. Her loyalty is uncompromisingly centered on the child and his best interests. In the hands of the parent substitute, what would have been a factfinder's cold investigative administrative proceeding becomes as undisruptive and humane as possible.

Confidentiality between a parent and child is honored and cherished but will be sacrificed when disclosure is reasonably necessary for the

child's best interests. Analogously, the substitute parent role includes the duty to testify but offers protection for confidential information through a GAL-child privilege approximating the parent-child privilege adopted in some states.[102] The GAL, not the court, nor the child, would have the right to waive the privilege where disclosure would be in the child's best interest.

The GAL should strive to develop an accommodating relationship with the child's parents. Such cooperation will assist the GAL in her investigations, interviews and research. However, the GAL's loyalty to the child is the guiding force and a cooperative relationship with the parents will be sacrificed if such an alliance jeopardizes the child's best interest.

Because of the sensitive and specialized nature of her role, the GAL necessarily must receive training. "[D]etermining what is in the best interests of the child is extremely difficult even for a child's parent."[103] In order to "[l]earn enough to be able to function as a good parent would in helping the child make litigation-related decisions,"[104] a GAL must have specialized training. "The guardian *ad litem* should receive training in how to seek information from a child in an appropriate manner."[105] Part d(2) of the proposed GAL statute found in this article's appendix[106] offers general guidelines for the training of GALs. This outline includes specialized training in family systems, mediation, cultural and ethnic diversity, and gender-specific issues, resource referral and child development. This partial list illustrates the highly specialized and comprehensive training necessary to fully prepare a GAL for service.

Becoming an effective parent substitute also requires some legal training. Nonlawyers should receive training in the law and procedures surrounding custody and visitation.[107] The GAL needs to know when to consult a lawyer, what information a lawyer will need, and what functions a lawyer can and should perform.

Although a parent substitute need not *be a lawyer,*[108] she must certainly have access to one.[109] By consulting with a lawyer, the GAL can ensure that the child's best interests are zealously pursued.[110] The child's wishes will be heard and weighed appropriately by the GAL in the course of her best interests assessment. However, the GAL, like a parent, is expected to direct counsel to promote the child's best interests *over* his expressed wishes when those objectives conflict.[111]

Clearly, the child must have his interests zealously represented. Such representation is indispensable for adequate protection of the child's interest. However, legal representation must be the full extent of the lawyer's role. Ethical constraints and lack of training make her unsuitable to act as a champion. She must not be in the position of discerning the child's interest nor acting as the child's GAL. Severing the lawyer functions from the champion functions creates a workable solution.

The lawyer's role would be limited to advocating the child's best interests as communicated to the lawyer by the guardian. In other words, the lawyer would act as the GAL's lawyer, hired and retained by the child's GAL, not retained by the child himself. The guardian's direction can be compared to the direction of the child's parent. It is the lawyer's charge to assist the guardian in carrying out her duties as an advocate for the child's best interests. For example, if the guardian determines that the child should live with his father, the lawyer will then advocate that position and will provide legal assistance to the guardian in order to accomplish that goal.

The parent substitute model eliminates the lawyer's ethical conundrums because she will not be obliged to act as a witness nor will she be required to act outside of her competence as is the case when a lawyer is the appointed GAL. The lawyer is relieved of the obligation to evaluate a child's capacity and/or his best interests. Neither will she be asked to advocate against her clients wishes. The lawyer's client is the GAL and *she* will direct counsel.

This model sacrifices the GAL's right to actively participate in the courtroom, but delegates that role to a lawyer (who is far better qualified). All advocacy-related duties should, and do, remain with the lawyer under the substitute-parent GAL model. The GAL's role in court is limited to the same activities that would be permitted for the child's parents when asserting their child's interests in the context of a custody and visitation proceeding. The GAL/lawyer duo guarantees that the child's best interests will receive zealous representation. The GAL supplies

the best interest determination and the lawyer supplies the zealous advocacy. Essentially, the substitute parent is the champion relieved of her lawyerly constraints and augmented by the GAL-client privilege.

Happily, adoption of the substitute parent model will decrease costs. Much of the work, now performed by lawyers, will be performed by GALs; and hourly fees for trained GALs tend to be far less than those for lawyers.[112] Whichever model is adopted, the source of the GAL's funding can cause confusion. In many states, the parents are responsible for the costs associated with the appointment of a GAL.[113] That the child's parents are paying the GAL's fees may mislead the parents and/or the GAL into assuming a duty between the GAL and the parents. Payment arrangements can also create judicial concern over possible alliances between the parents and the GAL which would compromise the GAL's integrity.[114] It is a delicate proposition for a lawyer to advocate his client's wishes against the wishes of his payor. Clear communication and adequate training will minimize these potentialities.[115]

Although some states have used GALs as parent educators,[116] because of potential conflicts of interests arising from simultaneously representing the child and educating the child's parents, the GAL should avoid acting as a family service provider. However, the trained GAL, as protector of the child's interests, may refer the parents to mediation, counseling, settlement, parent education, or other services.[117]

The substitute parent role closely parallels the champion except that it specifically prohibits the GAL acting simultaneously as the child's advocate. This role envisions complementing the GAL appointment with an appointment of an attorney to fulfill the child's advocacy needs. The substitute parent model makes appropriate use of the child's wishes by including them in her best interest analysis.[118] The GAL fosters a cooperative relationship with the child's parents ultimately subject to the pursuit of the child's best interests.[119] The parent-type GAL model recognizes the absolute necessity of extensive specialized training for GALs making the best interest evaluation.

Such a model will reduce the cost of GAL appointments, improve the quality of GALs appointed, and most importantly, adequately protect the child throughout the disruptive proceedings. The parent substitute model offers the best of both worlds: the zealous advocacy of the child's best interest from the traditional advocate and the reliable evaluation and uncompromising protection from the GAL[120].

VIII. Conclusion

The substitute parent role is the best model for ensuring that the court's final order will represent the child's best interest. It relieves the lawyer from the myriad of conflicts inherent in the other roles and eliminates the necessity for her to make complicated assessments of a child's capacity and best interests. It allows the lawyer to act competently, within her area of expertise, and it provides a capacitated, knowledgeable, adult-client—the GAL—to direct her representation.

In order to enhance judicial correctness and to serve the child's needs in CCV cases, the court should continue to appoint GALs. The GAL will have access to a lawyer—a must for zealous and effective representation of the child. The GAL should work in tandem with a lawyer and the lawyer should be guided and directed by the GAL regardless of who is paying her fees. The trained GAL should ascertain the child's best interests and consult with a lawyer for the purpose of discovering the most effective legal means for advancing those interests.

Regardless of which model is utilized, it is imperative that the guardian's role be clearly defined and consistent.[121] All persons involved in the proceedings must have a common understanding of precisely what role the GAL is playing in each individual case.[122] Appendix A offers a sample GAL statute that can serve as a template for states committed to unifying and clarifying GAL roles, appointments, requirements, and procedures. The court, GAL, parents, and child must know, with certainty what role the GAL is playing.

Most importantly, the substitute parent GAL will adequately protect the child. The substitute parent model offers the child access to a trained guardian who is not bound—and gagged—by adherence to the Model Rules and Model Code. The child receives the attendant benefits of the GAL-child privilege and yet his

confidences will be disclosed in the pursuit of his best interests. The extensive training provided for in the parent substitute model guarantees that an efficient and knowledgeable GAL will protect the child throughout the proceedings. Additionally, the child will not be subject to an amateur evaluation of his needs—nor will those unreliable evaluations subsequently be asserted in court. The parent substitute model is the only model that contemplates serving the child's interests throughout the proceedings, whether in or out of the courtroom. The substitute parent model satisfactorily answers the question, "What's a GAL to do?" and closely represents the ideal of what a GAL should be.

APPENDIX A: Proposed Statutes

The following proposed statutes are an adaptation of provisions from pages 1811-15, Stuckey, *supra* note 2, and from Missouri Supreme Court's, STANDARDS with COMMENTS for GUARDIANS *AD LITEM* in MISSOURI JUVENILE and FAMILY COURT MATTERS. Together, they contribute invaluable clarity and substance to practical GAL guidance.[123] The strength of these provisions lies in their breadth and depth. The provisions cover appointment and eligibility of GALs (including training requirements), as well as detailed information about the GAL's duties and responsibilities toward the child, the parents, and the court.[124]

The section on GALs and lawyers describes the GAL-lawyer duo preference, but also addresses the difficult circumstances where the GAL is also a lawyer. Importantly, the purpose (part b) and the basic responsibilities (part e) provide a conceptual framework that assists in shifting our flawed and conflicted perceptions of GALs into a workable model perspective. I recommend consideration of these provisions to any state committed to advancing efficient and effective GAL appointments.

Proposed Statute—Guidelines for Children's Guardians *Ad Litem*

a. Definitions.
   1) "Guardian *ad litem*" means an individual who is appointed by a court to represent the best interests of a minor child.
   2) "Minor child" means an unemancipated child under the age of eighteen.
   3) "Parent" means the natural or adoptive parent, the stepparent or foster parent, guardian, or other adult having legal or practical responsibility for the minor child.

b. Purpose of the Guardian *ad litem* Statute
   1) [STATE NAME]'s children deserve quality guardian *ad litem* representation, whether by a lawyer, or a volunteer. To ensure the best possible guardian *ad litem* services, there needs to be clarity and consistency in defining the role and responsibilities of the guardian *ad litem*. To perform his or her duties effectively, the guardian *ad litem* requires knowledge of the role, understanding of the court's expectations, and knowledge of the criteria used to judge his or her performance.[125]

c. Appointment of Guardians *ad litem*. The court shall appoint a trained guardian *ad litem* for a minor child in any action affecting the family if the legal custody or physical placement of the child is contested.

d. Training of Guardian *ad litem*
   1) No person shall be appointed as guardian *ad litem* without first completing twelve hours of specialized training. Thereafter, to continue to be appointed as a guardian *ad litem* a person shall complete six hours of specialized training annually. Completion of the training hours shall be evidenced by an affidavit filed with the appointing court by July 31 of each year. The court may accept, in lieu of the initial twelve hours of specialized training, an equivalent number of hours experience as a guardian *ad litem* prior to the effective date of the adoption of these standards.
   2) The specialized training shall include, but is not limited to, the following topics:
      A) Dynamics of child abuse and neglect issues.
      B) Factors to consider in the determining the best interest of the child, including permanency planning.

C) Inter-relationships between family system, legal process and the child welfare system
D) Mediation and negotiation skills.
E) Federal, state and local legislation and case law affecting children.
F) Cultural and ethnic diversity and gender-specific issues.
G) Family and domestic violence issues.
H) Available community resources and services.
I) Child development issues.
J) Guardian *ad litem* standards.

3) Programs providing guardian *ad litem* training to meet the provisions of this standard shall be accredited by the Supreme Court of [STATE].

e. Basic Responsibilities of Guardians *ad litem*. The principal responsibility of guardians *ad litem* is to protect the best interests of minor children in litigation. Guardians *ad litem* serve, in effect, as surrogate parents for the limited purpose of helping children make decisions about their interests in litigation. They should try to perform such functions as a responsible parent would perform them under similar circumstances.

f. Specific Responsibilities With Respect To Children.
1) Guardians *ad litem* should carefully explain to their wards the extent to which their conversations are not confidential and under which circumstances they are allowed, or may be compelled, to disclose confidences and secrets told to them by the children.
2) Guardians *ad litem* should communicate frequently and openly with their wards, as appropriate in light of each child's age and maturity. This includes keeping children informed about the issues being litigated and the children's interests in them, and discussing litigation-related decisions with children (before they have been acted on, if possible).
3) Guardians *ad litem* should defer to children's wishes, absent a good reason to do otherwise.
4) If it is determined that the recommendations of the guardian *ad litem* are not in agreement with the wishes of the child, the court shall be informed by the guardian *ad litem*. Whenever the court believes that it is appropriate, the court shall discharge the guardian *ad litem* and appoint another.
5) The guardian *ad litem* shall not be unduly restricted in access to the child by any agency or person. The guardian *ad litem* should meet with the child in the child's placement as often as necessary to determine that the child is safe and to ascertain and represent the child's best interests.
6) Unless otherwise provided by law, the guardian *ad litem* shall be provided, upon request, with all reports relevant to the case made to or by any agency or any person and shall have access to all relevant records of such agencies or persons relating to the child or the child's family members or placements of the child.

g. Responsibilities With Respect To Parents. A guardian *ad litem* should communicate frequently and openly with the parents of the minor child, unless it would be contrary to the child's best interests or otherwise inappropriate under the circumstances. Unless the parents' interests conflict with those of the child, a guardian *ad litem* should solicit the parents' input before making decisions related to the litigation and should give deference to their wishes, absent a good reason to do otherwise.

h. Responsibilities With Respect To Lawyers.
1) If the court appoints a court non-lawyer GAL, the services of a lawyer shall be obtained when the volunteer has need for legal advice and assistance.
2) A guardian *ad litem* should request that a lawyer be appointed (or hired) for the child, if a similarly situated parent would want the child to have legal representation. If a child has a guardian *ad litem* and a lawyer, the guardian *ad litem* is responsible for instructing the lawyer.

i. Responsibilities If Guardian *ad litem* Must Serve As Lawyer.
1) The roles of a guardian *ad litem* and a lawyer for the child are different and

must be clearly distinguished. A lawyer guardian *ad litem* is not the lawyer for the child and, therefore, advocates the best interests of the child rather than merely representing the child's preferences.

2) If a guardian *ad litem* is required to function both as guardian *ad litem* and as a lawyer for a child, and circumstances arise in which the responsibilities of a guardian *ad litem* would indicate conduct different from that which would be required of a lawyer, the guardian *ad litem* must give primary allegiance to the responsibilities of a guardian *ad litem*.

j. Responsibilities With Respect To Courts.

1) A guardian *ad litem*, whether a lawyer or a volunteer, shall be guided by the best interests of the child and shall exercise independent judgment on behalf of the child in all matters.

2) Guardians *ad litem* owe their primary duty of allegiance to the children they represent. They are not agents of courts and should not be expected to serve as independent fact finders for courts. They should be allowed to participate in litigation as children's representatives to the extent that parents would be allowed to participate. Thus, they ordinarily may be called as witnesses by the court or by other parties. They should not be viewed or used as expert witnesses about issues before the court, unless they can be qualified as experts under the normal rules governing expert witness qualification.

3) The guardian *ad litem* shall present recommendations to the court on the basis of the evidence presented and provide reasons in support of these recommendations. When authorized by law, the guardian *ad litem* may offer evidence to the court. If the guardian *ad litem* testifies, the guardian *ad litem* shall be duly sworn as a witness and be subject to cross-examination.

4) The guardian *ad litem* in a pending case shall protect the interests of the child who is a witness in any judicial proceeding relating to the case in which the guardian *ad litem* has been appointed. The guardian *ad litem* shall explain, when appropriate, the court proceedings and process to the child.

k. Participation in Proceedings Outside the Courtroom. The guardian *ad litem* shall participate in the development and negotiation of any plans, orders and staffings that affect the best interests of the child.

APPENDIX B: Discussion of Proposed Statutes

Beginning with detailed qualification requirements, the proposed GAL statute promotes serving the child's best interests generally, provides a framework for communication, and offers specific direction regarding the legitimate use of the child's wishes. After defining the key terms and summarizing the purpose and necessity of the regulations, the proposed GAL statute outlines the circumstances under which GAL appointments are permitted. Part d provides that the GAL must receive specialized training and generally defines what topics the training must cover.

Parts e through k outline the principle responsibilities of the GAL, which are analogous to the duties of a parent substitute described in Section V.[126] Specifically, part f addresses the GALs' rights and duties with respect to her child-client. It provides guidance for communication between the GAL and the child, describes the role of the child's wishes in the best interest evaluation, and ensures the GAL's access to information relevant to her determination. Part g envisions the GAL's and the parents' relationship as open and congenial, but ultimately subject to the best interests of the child. The GAL's right to retain a lawyer to represent the child's best interest is covered in part h. Part i deals with the difficult situation where the GAL is also a lawyer. It provides that, in the event that the GAL is required to serve both as a GAL and a lawyer, the duties of the GAL will trump those of the lawyer.

What role the GAL can play in the courtroom is covered in part j, which provides that the GAL may participate in the litigation in the same manner and to the same extent that the parent to the child would be permitted to participate. Also, the substitute parent GAL will

offer her recommendation to the court (supported by evidence if appropriate) as to the child's best interest. This same section further requires the GAL to act independently and in the child's best interests always. Part g(2) further stresses that the GAL owes her primary allegiance to the child, not to the court, thus removing any question as to whether the GAL is to act as a factfinder described in section V. Although a GAL may be compelled to act as a witness, the GAL-client privilege[127] must be invoked where it is in the child's best interest. Finally, part k authorizes the GAL to participate in any extra-courtroom proceedings concerning the child.

To be fully functional, any GAL statute should be enacted in tandem with a GAL-child privilege.[128] Such a privilege would facilitate candid disclosure and foster the trusting relationship vital to meaningful communication and effective representation.[129] The privilege must honor the underlying purpose in appointing GAL's by permitting disclosure where necessary to protect the child's best interests.[130]

Needless to say, the proposed statutes indicate a marked improvement over the GAL statutes of most states.[131] If adopted, these provisions, would clarify the GAL's role, effectively and efficiently protect the child in court and throughout the proceedings, decrease costs, and assist the court in crafting a custody or visitation arrangement that truly is in the best interests of the child. This author heartily recommends their immediate consideration for enactment by any and all of the forty-six states with inadequate GAL guidance.[132]

Endnotes

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[1] Jan Hoffman, *When a Child-Client Disagrees with the Lawyer*, N.Y. TIMES, Aug. 28, 1992, at B6 ("Twenty-seven states now permit lawyers or guardians, who may or may not be lawyers, to be assigned to children in custody disputes.")

[2] Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785, 1793 n.28 (1996) (citing Lawrence B. Custer, *The Origins of Parens Patriae, The State as Parent or Tyrant?* 27 EMORY L.J. 195, 195-200 (1978)).

[3] BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

[4] The proceedings are either custody or visitation conflicts.

[5] *In re* the Marriage of Rolfe, 699 P.2d 79, 86 (Mont. 1985) ("The child custody dispute presents a unique situation because the child, although not a party to the action, is the person most affected by the action.").

[6] For example, in direct prohibition of MODEL RULE 1.2(a) mandating that the lawyer advance the client's wishes, a GAL may be required to pursue a client's best interests over his wishes. Similarly the factfinder's function of disclosing the child's confidences to the court is squarely adverse to the advocate's duty not to do so under Model Rule 1.6(c).

[7] Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputed Arising from Divorce*, 87 YALE L.J. 1126, 1128 (1978) ("Role of counsel for the child is dangerously lacking in definition.").

[8] This provision does not describe the GAL's functions in any degree. Also notable is that this statute appears to be limited to cases where the child is a party to the action. There is no separate statute pertaining to custody and visitation cases specifically, where the child is not an adverse party in the proceedings. IDAHO CODE § 5-306 (Michie 2003).

[9] *See* Martin Guggenheim, *The Right to be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 123 (April 1984) (noting that the implications of the final order are insignificant because both parents are fit, thus the potential harm to the child from a "wrong" decision is negligible).

[10] It is imperative to note—and to keep in mind—that the substitute parent model is recommended only for custody and visitation

litigation where neither the child, nor the state is a party to the action. It is beyond the scope of this article to address roles for GALs appointed in criminal, abuse and neglect, or child protection proceedings.

[11] The author's research revealed no statutes authorizing GAL-like appointments for children in contested custody or visitation proceedings in the following states: Alabama, Arkansas, Idaho, Kansas, Massachusetts, Mississippi, Nevada, North Carolina, South Carolina, and Wyoming.

[12] Fed. R. Civ. P. 53 (2004)

[13] *Id.*

[14] *Id.*

[15] Maryland judges assign GALs differing roles on case-by-case basis: pure advocacy, pure fact finder or a combination. Stuckey, *supra* note 2, at 1790.

[16] Alaska'a GAL statute provides: (a) In an action involving a question of the custody, support, or visitation of a child, the court may... appoint an attorney or the office of public advocacy to represent a minor with respect to the custody, support, and visitation of the minor. (c) ...The court...shall outline the guardian *ad litem*'s responsibilities and limit the authority to those matters related to the guardian's effective representation of the child's best interests. ALASKA STAT. § 25.24.310 (2003).

[17] Among those states are New Hampshire and Oklahoma. Both refer to other documents for guidance, but in neither case could I locate those handbooks.

[18] New York's ambiguous guidelines resulted in widely varying decisions on the proper role of the lawyer. Angela D. Lurie, Note, *Representing the Child-Client: Kids are People Too,* 11 N.Y.L. Sch. J. Hum. Rts. 205, 218-19 (1993).

[19] New York, NY. Similarly, regardless of what the statute might say, courts have interpreted similar statutes differently.

[20] Vermont's GAL responsibilities are laid out in VT. FAM. CT. R. 7.

[21] Utah's code provides for representation until the final action. UTAH CODE ANN. § 30-3-11.2 (2004).

[22] New Hampshire instructs the GAL to protect the child beyond the immediate litigation. N.H REV STAT. § 458:17-a(I) (2003).

[23] IDAHO R. CIV. P. 16(L)(3).

[24] IND. CODE § 31-15-6-1 § 1 (2004)

[25] This discussion of the advocate role is specific to lawyers acting as advocates although the concepts should apply to others fulfilling the advocate model.

[26] See *generally* THE AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES] and THE AMERICAN BAR ASSOCIATION MODEL CODE OF PROF'L RESPONSIBILITY (1983) [hereinafter MODEL CODE].

[27] MODEL RULES R. 1.6.

[28] Instances in which the court requests counsel to represent only the child's wishes are rare to nonexistent. Because children are not entitled, under the law, to make their own decisions -- they are subordinate to their parents -- it makes sense that they will not be granted that right simply because their parents are embroiled in a custody battle.

[29] *Rolfe,* 699 P.2d at 86 ("But, given the immaturity of the client and the pressures that often exist in a divorce situation, it is this Court's opinion that the best interests of the child, the paramount concern in all custody disputes, is best served by modifying the traditional lawyer-client relationship.").

[30] In *Barnthouse* the Colorado court rejected a father's argument that the lawyer should have advanced the children's wishes. The duty "to represent the interests of a . . . child with respect to his custody, support, and visitation" was interpreted by the court "to mean that an appointed attorney . . . [has a duty] to determine and recommend those available alternatives which are in the best interests of a child." *In re* Marriage of Barnthouse, 765 P.2d 610, 612 (Colo. Ct. App. 1988) (interpreting COLO. REV. STAT. § 14-10-116 (1987)); *Id.* ("An attorney must not take a passive role, but instead must gather all available evidence as to the child's best interests."); *Id.*("The attorney is not simply to parrot the child's expressed wishes.") (citing *In re* Marriage of Kramer, 580 P.2d 439 (Mont. 1978)). Montana courts have also interpreted use of the word "interests" in its statutes to mean *best interests* as opposed to *expressed interests. Rolfe,* 699 P.2d at 86.

[31] Lurie, *supra* note 18, at 218-19 (New York's ambiguous guidelines resulted in widely varying decisions on the proper role of the lawyer.).

[32] Although a lawyer may not be appointed as a guardian *ad litem*, but simply as a lawyer, courts have said that the lawyer's obligations were similar to those imposed on a guardian *ad litem*. *Id.* at 222-23. Recall that this article does not address the role of counsel in adversarial or quasi-adversarial proceedings where children are entitled to greater protection of due process and greater need for zealous representation. *Rolfe*, 699 P.2d at 85.

[33] *See generally* MODEL RULES.

[34] Lawyers must offer to the child full legal representation that approximates that enjoyed by adults. MODEL RULES R. 1.14(a) (2003); Annette R. Appell, *Decontextualizing The Child Client: The Efficacy Of The Attorney-Client Model For Very Young Children*, 64 FORDHAM L. REV. 1955, 1956 (March 1996).

[35] Lurie, *supra* note 18, at 207 (arguing that advocate of the mature child's wishes is the only appropriate role); *Id.* at 214 ("In child custody matters, the New York Bar Association advises an attorney to develop a strategy in conjunction with her client. If the child is old enough to articulate his desires and to assist counsel, a plan should be developed with the child's cooperation and agreement.").

[36] MODEL RULES 1.14 (a) (emphasis added), *supra* note 23.

[37] Perhaps the very nature of a custody determination hearing compels finding that the child is precapacity. Arguably, the simple fact of a custody proceeding implies that the child is not yet self-determining. Jinanne S.J. Elder, *The Role of Counsel for Children: A Proposal for Addressing a Troubling Question*, 35 B. B. J. 6, 7-8 (JAN./FEB. 1991); In the Interest of J.P.B., 419 N.W.2d 387, 391 (Iowa 1998) ("[T]he very reason for contested custody proceedings is that the children involved are not yet mature enough to be self-determining.") (cited in *supra* note 15, at 221-2); *Rolfe*, 699 P.2d 79, 86 (Mont. 1985) (stating an identical observation).

[38] MODEL RULES, *supra* Note 26, 1.14(b).

[39] *Id.* cmt. 2.

[40] Leary v. Leary, 627 A.2d 30, 37 (Md. Ct. Spec. App. 1992); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-7 (1980) [hereinafter MODEL CODE] ("[T]he authority to make decisions is exclusively that of the client"); *Rolfe*, 699 P.2d at 86. ("[A] lawyer cannot perform any act or make any decision which the law requires his client to perform or make."); *Id.* ("In a normal client-lawyer relationship the lawyer's role is not to determine the client's interest, his role is to advocate the client's interest."). Other authority counters this foundational tenet of advocacy. MODEL CODE EC 7-12, *supra* ("If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client."); Veazy v. Veazy, 560 P.2d 382, 390 (quoting EC 7-12 in full).

[41] *Id.*

[42] Legal education does not equip lawyers to make decisions on behalf of children. Appell, *supra*, note 34, at 1965-68.

[43] *Rolfe*, 699 P.2d at 85. ("[I]s the attorney appointed to represent a child in a custody dispute ethically bound to advocate the child's wishes or to advocate the child's best interests?").

[44] MODEL RULES R. 1.2(a) (2003).

[45] MODEL CODE, *supra* note 35, EC 7-7.

[46] Conference on Ethical Issues in the Legal Representation of Children, *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301, 1312 (March 1996).

[47] MODEL RULES, *supra* note 28, 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); Degen v. Steinbrink, 195 N.Y.S. 810, 814 (1922) ("If the attorney is not competent to skillfully and properly perform the work, he should not undertake the service.") *aff'd mem.*, 142 N.E. 328 (1923); Louis I. Parley, *Representing Children in Custody Litigation*, 11 J. AM. ACAD. MATRIM. LAW 45, 56-7 (Winter 1993).

[48] Appell, *supra* note 29, at 1958 ("Thus, decisions for precapacitated children may be based on institutional, political, or personal biases, and not on the children's actual needs.").

[49] Parley, *supra* note 42, at 56-7 (warning that lawyers may not be competent to address the best interest of the child).

[50] MODEL RULE, *supra* note 26, cmt. 2.

[51] MODEL RULES, *supra* note 26, 1.14 cmt. 2 ("If

the person has no guardian or legal representative, the lawyer often must act as de facto guardian."); In the Interest of A.M., a minor child, 614 So. 2d 1161 (Fla. 4th DCA 1993) ("The guardian's obligations are to perceive and promote the child's best interests.").

[52] Lurie, *supra* note 18, at 210.

[53] Stuckey, *supra* note 2, at 1785.

[54] *See* Appell, *supra* note 34, at 1957 (discussing the misapprehensions of the courts and the GAL).

[55] *Id.* At 1958.

[56] Lanette P. Dalley, *Imprisoned Mothers and Their Children: Their Often Conflicting Legal Rights*, 22 HAMLINE J. PUB. L & POL'Y 1, 10 (2000). The following illustrates the nebulous quality of determining a child's best interests:

> In fact, each interviewed guardian interpreted this concept differently. One guardian explained, 'It's a very subjective standard. It's something that each guardian develops from their own upbringing.' For instance, one guardian provides a vague description of the best interest of the child simply as a 'gut feeling': 'It's all those things that sometimes you just have a gut feeling for, and sometimes it's more than that. You can actually see it, touch it, and feel it.' These remarks indicate the subjective, personal nature of the guardian's decisions.

Id. at 10-11.

[57] WASH. REV. CODE § 26.09.002 (1997).

[58] Although Idaho's statute is intended to guide the court in determining best interests, it can be readily inferred that the same factors should guide anyone making the best interest evaluation. Idaho Code § 32-717 (Michie 2002). Like Idaho, Wisconsin uses a list of factors to consider when determining a custody arrangement in the child's best interest:

CONSIDERATIONS IN DETERMINING CUSTODY

> 1.The love, affection, and other emotional ties existing between the proposed custodians and the child
>
> 2.Assessment of the physical and mental health of the child and proposed custodians.
>
> 3.The amount of time that proposed custodians will have available to devote to the child and the quality of their interaction with the child.
>
> 4.Background of the proposed custodians.
>
> 5.Home situation that would be created for the child by each proposed custodian.
>
> 6.Proposed plan of the custodian for the care, supervision, and education of the child.
>
> 7.Basic motivation for desiring custody.
>
> 8.Child's wishes based on chronological age and emotional maturity of the child.
>
> 9.History of the prior relationships of the proposed custodians with the child.
>
> 10.Attitude toward visitation of non-custodial parent created by proposed custodial parent.
>
> 11.The recommendations written or oral of trained social worker, Family Court Counselor, and that of a psychiatrist or psychologist if involved.
>
> 12.The existing statutory and . . . case law as applied to this specific fact situation.

Veazy, 560 P.2d at 387, *supra* note 40 (citing 2 FAM. L. REP. 2098-99 (Wis. 1975)).

[59] Some states require the GAL to disclose to the court any discrepancy between the child's wishes and the GALs determination of his best interests.

[60] WASH. REV. CODE § 26.09.220 (1997).

[61] These complicated questions fortify the argument for extensive GAL training.

[62] *See section IV* of text.

[63] Any time the best interest advocate is employed the "Champion has an inordinate influence on legal proceedings. By deciding what a child's best interests are, the Champion is in effect making legal decisions that are properly in the province of the judiciary." Lurie, *supra* note 18, at 209. Idaho's statute implies by the language that "the courts will weigh" factors, that the court, not the lawyer, should make the best interest determination. This leaves the Idaho lawyer in the position as factfinder or wishes advocate. IDAHO CODE § 32-717 (Michie 2002),

Supra note 58.

[64] Pierce v. Soc'y of Sisters, 268 U.S 510, 535 (1925) ("The child is not the mere creature of the state.").

[65] *See section* I of text.

[66] The child receives no protection from the effects of the multiple interviews, evaluations, depositions, and other investigative efforts.

[67] *See section* VII of text.

[68] Lurie, *supra* note 18, at 210 (describing factfinding by the GAL as a new form of court ordered discovery).

[69] *Id.*

[70] The GAL should offer evidence as an investigator. *Id.*

[71] Renee Goldenberg & Nancy S. Palmer, *Guardian Ad litem Programs: Where They Have Gone and Where They Are Going*, 69 FLA. B.J. 83, 86 (Dec. 1995) ("When writing the guardian *ad litem* report, it is important to remember that the guardian is an investigator and should only represent findings and impressions to the court. It is the responsibility of the judge to know the law and to follow it.").

[72] *In re* Appell, 409 N.Y.S.2d 928, 931(1978) (reinforcing that GALs should remain neutral). *See also* Lurie, *supra* note 18, at 210.

[73] The GAL's role is to assist the court in achieving a proper disposition. Lurie, *supra* note 18, at 210; Goldenberg & Palmer, supra 71, at 86 ("[T]he purpose of a report is to inform, not pass judgment. The purpose of the report is to communicate the observations of the guardian *ad litem*.").

[74] Guggenheim, *supra* note 9, at 108 ("[T]his hybrid inquisitorial-adversarial process presents the same danger that a fully inquisitorial system would: the risk of subordinating the importance of the public trial to out-of-court, pretrial discovery proceedings."). It is can also undermine the parties' confidence in the judge as a neutral arbiter.

[75] Edward Sokolnicki, *The Attorney as Guardian Ad Litem for a Child in Connecticut*, 5 CONN. PROB. L.J. 237, 244 (1991) ("Rather, the attorney makes an investigation to determine what facts and circumstances will ultimately affect the rights and interests of the child.").

[76] Lurie, *supra* note 18, at 210.

[77] *See supra* note 58 and accompanying text.

[78] Stuckey, *supra* note 2, at 1795 ("[I]t is the guardian *ad litem* who is acting in loco parentis, not the government and not the judge."). *Contra* Parley, *supra* note 47, at 42 (describing the court as properly acting as a "wise affectionate parent").

[79] *See* section VI of text.

[80] Painter v. Bannister, 140 N.W.2d 152, 153 (Iowa 1966) *cert. denied*, 385 U.S. 949 (1966).

[81] Stuckey, *supra* note 2, at 1789.

[82] Sokolnicki, *supra* note 75, at 244 ("As an investigator, the attorney does not explicitly advocate an 'outcome for the child' *nor is there an increased legal representation.*") (emphasis added). The factfinder role lacks the lawyer/client relationship as defined by our adversarial system. Lurie, *supra* note 18, at 210.

[83] Idaho's GAL's, in particular would benefit from a statute tailored to guide GAL's in custody and visitation litigation where the child is not a party to the action.

[84] A District of Columbia court turned mental somersaults in a valiant effort to reconcile the overlapping GAL functions with little success. By labeling and re-labeling the GAL's role no fewer than five times, the court found that the lawyer was able to serve as both a factfinder and an advocate. The convoluted text from the case is entertaining and underscores the confusion resulting from shifting roles.

> The guardian *ad litem* continued as an advocate, according to his testimony, almost to the time of the disposition in the neglect proceeding. Later, while monitoring . . . appellant's visits with the child, the guardian *ad litem* may have functioned more like a fact-finding guardian *ad litem.* Once the adoption proceeding began, however, he resumed his role as advocate. But as a witness for appellees he . . . assumed the role of neutral factfinder . . . . After completing his testimony, the guardian *ad litem* again resumed his advocacy role.

S.S. v. D.M., 597 A.2d 870, 876-77 (D.C. 1991).

[85] Stuckey, *supra* note 2, at 1789 (emphasis added).

[86] *See* section IV of text.

[87] Lurie, *supra* note 18, at 229 ("Although case law exists in New York that implies that an attorney should play a role that is part advocate and part guardian *ad litem*, case law in other states urges that one attorney cannot fill both of

these roles because of an inherent conflict of interest.") (citing *In re Dobson*, 212 A.2d 620, 622 (Vt. 1965); State v. Ovitt, 268 A.2d 916, 918 (Vt. 1970); *In re J.V.*, 464 N.W.2d. 887, 892 (Iowa Ct. App. 1991)); *Rolfe*, 699 P.2d at 85 ("A lawyer may, where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client") (citing Model Code DR 7-101(B)(1). See *Veazy*, 560 P.2d 382 (deciding custody contrary to child's expressed wishes).

[88] MODEL RULE and MODEL CODE, *supra* note 26.

[89] In *Veazy*, 560 P.2d at 390, the advocate-guardian had to protect the child's confidences, but in *Ross v. Gadwah*, 554 A.2d 1284, 1286 (N.H. 1988), the court held that the child's confidences were not protected when he was represented by a guardian.

[90] The *Rolfe* court required the lawyer to disclose that his client's wishes were not in his best interests:

> If the court-appointed attorney concludes that the child's expressed wishes are not in his best interest the attorney must disclose this to the court. The district court must be clearly informed of the child's wishes and the basis for the attorney's determination that it is not in the child's best interest to live with the preferred parent.

Rolfe 699 P.2d at 52-3 (quoting *In Re* Marriage of Kramer, 580 P.2d 439, 444 (Mont. 1978)). Colorado requests similar disclosure. Lurie, *supra* note 18, at 221; Parley, *supra* note 47, at 47 (explaining that a lawyer has a duty to disclose all pertinent information).

[91] Lawyers are faced with the additional dilemma of whether, when and how to inform her client that his communications may be disclosed to the court.

[92] *See section* II of text.

[93] Order: Standards with Comments for GALs in Missouri Juvenile and Family Court Matters, Supreme Court of Missouri (September 17, 1996) (en banc).

[94] Painter v. Bannister, 140 N.W.2d 152, 153 (Iowa 1966), *cert. denied*, 385 U.S. 949 (1966).

("Legal training and experience are of little practical help in solving the complex problem of human relations"); Appell *supra* note 34, at 1958. ("Decisions may be based on institutional, political or personal biases and not on child's needs.").

[95] These conflicts mirror those faced by the dual advocate/champion in the precapcitated client section. Goldenberg & Palmer, *supra* note 71, at 84 ("The advocate must articulate the child's wishes. If there is a conflict, the guardian must step aside from one role or perhaps both.").

[96] Some in the legal community hold the view that advocating for the client's wishes in the only ethical function for a lawyer:

> [T]he only ethically proper role for an attorney assigned to a mature child as . . . legal counsel is that of an advocate for the child's expressed wishes. If the child in question is too young to adequately express a point of view, the . . . attorney acting as legal counsel for an immature child should seek to have a guardian *ad litem* appointed for the child. The attorney should then advocate for her client's wishes as expressed by the child's guardian.

Lurie, *supra* note 18, at 207; *see also* Parley, *supra* note 47, at 56 (arguing that Model Rule 1.14 does not "suggest that counsel should take on the powers of a guardian").

[97] Goldenberg & Palmer, *supra* note 71, at 84 ("[A]n attorney appointed as a guardian *ad litem* can no longer act as an attorney advocate unless the order specifically states so and appoints a nonadvocate as well to take on the investigatory role.").

[98] *See supra* note 44.

[99] *Id.*

[100] Stuckey, *supra* note 2, at 1795 (noting that this parent replacement function is rarely acknowledged) (emphasis added).

[101] The GAL's role should be as a parent replacement/surrogate parent with limited duties, not as a court agent. The GAL should act in loco parentis. *Id.*

[102] The GAL must explain this limited protection to the child and accept any resulting loss of candor. *Id.* at 1801.

[103] *Id.* at 1799.

[104] *Id.* at 1800.

[105] Goldenberg & Palmer, *supra* note 71, at 86. The following excerpt describes the special nature

of working with children:

It is important for a guardian *ad litem* to know about children. Children function differently from adults. Their development is reflected in their thoughts, values and actions. It is important to understand the child's level of development. 'Translation' of a young child's terminology, innuendos, and gestures may be needed from a parent of a young child.

Id. at 87.

[106] *Id.* at 84.

[107] *Id.* at 84. The training necessarily differs depending on the existing expertise of the GAL.

> [T]rained GALs should have access to the advice, consultation, and advocacy of attorneys. After all, . . . custody proceedings occur in a legal arena where all other parties are represented by legal counsel; judges themselves are attorneys. Just as nothing in legal training prepares lawyers to make assessments about children, social workers and other nonattorneys are not necessarily trained in the law or oral presentation skills. Nonlawyers may be unable to recognize legal issues, legal interests, and the need for taking legal action; they are also unlikely to be skilled in motion practice, presentation of evidence, and the development of legal argument. Those activities are uniquely attorney functions.

Appell, *supra* note 34, at 1972.

[108] When assigning a GAL, many jurisdictions sensibly move away from appointing lawyers as GALs thus avoiding many of the conflicts that a lawyer encounters acting as a GAL. If the GAL is a lawyer she will have to grapple with the conflicts inherent in the dual advocate/champion model attributed to the irreconcilable direction of the Model Rules and Model Code. Jurisdictions assigning lawyers as champions must appreciate these inherent conflicts of interest and promulgate clear guidelines to assist the GALs in addressing them. See Appell, *supra* note 34, page 23-27.

[109] GALs must have access to a lawyer for legal representation, advice, consultation and advocacy. The lawyer will assist in recognizing legal issues, legal interests, the need to take legal action, motion practice, presentation of evidence, and development of legal argument. Appell, *supra*, note 34, at 1969 and 1972.

A nonlawyer representing a child should, then, have access to an attorney to assist in the presentation or defense of the...child's legal interests in court. For example, a child may want or need a change in parent-child visitation parameters. Without the ability to bring such matters to the court's attention, which in some jurisdictions may occur only through motion practice, all of the GAL's factfinding and assessments made regarding the child will not be very useful. Thus, it would not do for the child to be the only party without legal representation. Appell, *supra*, note 34, at 1972.

[110] Goldenberg & Palmer, *supra* note 71, at 84 ("A good option is to have a lawyer and a nonlawyer volunteer working together. This arrangement tends to avoid bias and brings more insight into the situation.").

[111] The GAL may properly disregard the child's wishes. Stuckey, *supra*, note 2, at 1788.

[112] Professor Appell discussed a model for dividing labor between the GAL and the lawyer:

> [A] model in which specifically trained GALs represent young children and attorneys represent the GALs may be more cost-effective because the bulk of the work—investigation and client contact—will be performed by the nonlawyers and less work will be performed by (the more expensive) attorneys, who will conduct purely legal work on behalf of the GALs.

Appell, *supra* note 34, at 1972.

[113] Montana's GAL statute provides: "The court may appoint a guardian *ad litem* to represent the interests of a minor dependent child with respect to his support, custody, and visitation...The court shall enter an order for costs and fees...against either or both parents." MONT. CODE ANN. § 40-4-205(4) (1975).

[114] Parley, *supra* note 47, at 63.

[115] *Id.* (offering suggestions to clarify the GAL's obligations to the parents).

[116] Goldenberg & Palmer, *supra note 71*, at 84 ("The guardian *ad litem* should reduce emotional trauma between the parents by educating them about the potential impact of the proceedings upon their children.").

[117] Goldenberg & Palmer, *supra* note 71, at 85 ("Courses and materials for guardians *ad litem* should include methods regarding conflict resolution and alternatives to adversarial dispute resolution, the impact of familial breakup on children, and techniques for helping the parties to de-escalate conflict.").

[118] *Id.* at 84.

[119] *Id.* at 86.

[120] The appendix offers examples of statutory language to accomplish this desirable GAL appointment. *Supra* p. 18 of text.

[121] The preamble to the Dane County, Wisconsin Procedural Guide for GALs provides:

> By selecting you to serve as Guardian *ad litem* in a custody case, the Court is demonstrating a trust in your ability to work steadfastly and impartially toward determining the best interests of the children involved. Everyone concerned in the case should be motivated toward resolving this issue with a minimum of disruption and trauma to the children. The role of the G.A.L. is to arrive at an independent determination of what is best for his wards. In arriving at his determination, the G.A.L. should utilize all the resources provided by the Court, but he should also avail himself of personal and separate resources. His final recommendation should be based on his own observations combined with the input afforded him from other sources. The trust accorded you includes confidence in your ability to properly perform your function without unduly straining the economic resources available for your reimbursement.

Veazy, 560 P.2d at 387, *supra* note 40 (citing 2 FAM. L. REP. 2098-99 (Wis. 1975)). This language is followed by a detailed list of rights and duties.

Montana's statute enumerates a GAL's duty as follows:

(a) to conduct investigations that the guardian *ad litem* considers necessary to ascertain the facts related to the child's support, parenting, and parental contact;

(b) to interview or observe the child who is the subject of the proceeding;

(c) to make written reports to the court concerning the child's support, parenting, and parental contact;

(d) to appear and participate in all proceedings to the degree necessary to adequately represent the child and make recommendations to the court concerning the child's support, parenting, and parental contact; and

(e) to perform other duties as directed by the court.

(3) The guardian *ad litem* has access to court, medical, psychological, law enforcement, social services, and school records pertaining to the child and the child's siblings and parents or caretakers.

MONT. CODE ANN. § 40-4-205 (2003).

[122] It is imperative to carefully craft a statutory scheme that will clarify GAL obligations, rights and duties. Goldenberg & Palmer, *supra* note 71, at 84 ("The guardian's role should be clearly defined by the court.").

[123] The surrogate parent model is comparable to the parent substitute role.

[124] Because the traditional attorney-client privilege will not apply to the substitute parent GAL, every GAL statute should be accompanied by confidentiality provisions to ensure that the child's confidences will be protected from disclosure. More on this, *supra* p. 25.

[125] STANDARDS with COMMENTS for GUARDIANS *AD LITEM* in MISSOURI JUVENILE and FAMILY COURT MATTERS. Missouri Supreme Court.

[126] *Id.* at 27. Parts B and C of *The Guidelines for Children's GAL's*; *Id.* at 20.

[127] *Id.* at 28.

[128] The following is a draft of GAL-Client privilege provision:

> Guardian *ad litem* -Child Privilege
>
> Confidentiality. A guardian *ad litem* should strive to protect confidential communications with his or her ward. A guardian *ad litem* should only disclose confidential communications when it is in the best interests of the guardian's ward to do so, and then only in relation to the proceedings for which the guardian *ad litem* is appointed. The presence of the child's parents or lawyers will not nullify the confidentiality of the communication, nor will the presence of

social workers, psychologists, or other persons who have been asked by the guardian *ad litem* to talk with the child in a professional capacity.

Privilege.

A guardian *ad litem* has a privilege to refuse to disclose and to prevent any other person except the minor child from disclosing confidential comm.-unications which were:

- made by a minor child represented by the guardian *ad litem*; and
- made within the context of such representation . . .

When Disclosure Is Allowed. A guardian *ad litem* may reveal confidential communications to the extent the guardian *ad litem* believes necessary:

- to promote or defend the child's interests;
- to prevent the child or someone else from committing a criminal or fraudulent act;
- to prevent the child from engaging in conduct likely to result in imminent death or substantial bodily harm to the child; however, the lawyer may reveal only the minimum information needed to prevent the harm, and shall do so in a manner designed to limit the disclosure to the people who reasonably need to know such information;
- to rectify the consequences of the child client's criminal or fraudulent act in the commission of which the guardian *ad litem*'s services were used;
- to establish a claim or defense on behalf of a guardian *ad litem* in a controversy between the guardian *ad litem* and the child, or to establish a defense to a criminal charge or civil claim against the guardian *ad litem* based upon conduct in which the child was involved; or
- to comply with the orders of a court or the rules of law.

Stuckey, *supra* note 2, at 1813-15.

However, if appropriate under the circumstances and to the extent possible in light of a child's age and maturity, a guardian *ad litem* should discuss with the minor child any intention to disclose a confidential communication and the reasons for doing so, and a guardian *ad litem* should give appropriate deference to the wishes of the child in making this decision, absent a good reason for doing otherwise. Stuckey, *supra* note 2, at 1815.

[129] *Id.* 1814.

[130] *Id.* 1828.

[131] *Id.* 1804-08.

[132] *Id.* 1806.